No. 97-843

In The

Supreme Court of the United States

October Term, 1997

AURELIA DAVIS,
as next friend of LASHONDA D.,

Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which was enacted pursuant to the Spending Clause of Article I of the United States Constitution, encompasses a cause of action against a school district receiving federal funds based upon a claim of student-to-student sexual harassment under a hostile environment negligence theory.[1]

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[1] Petitioner has identified two Questions Presented in her Petition for Writ of Certiorari. However, Petitioner's second Question Presented, "Whether the legal principles regarding sexual harassment that have developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, should be applied to analyze claims of sexual harassment under Title IX of the Education Amendments of 1972," was not decided by the Eleventh Circuit Court of Appeals in its *en banc* opinion in *Davis v. Monroe County Board of Education*, 120 F.3d 130 (11th Cir. 1997) from which Petitioner appeals. Accordingly, Petitioner's second Question Presented is not properly before the court. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Monroe County Board of Education, *et al.*, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Eleventh Circuit's decision in this case. The decision is reported at 120 F.3d 130 (11th Cir. 1997).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Davis' complaint alleged that beginning on or about December 17, 1992 and continuing through May 19, 1993, Petitioner's daughter Lashonda D. suffered hostile environment sexual harassment at the hands of a fellow fifth grade student and classmate, G.F. The complaint alleged that each incident was reported to a teacher and the principal, but that no action was taken against G.F. Because Petitioner's complaint was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), the factual record has not been developed. However, the specifics of Petitioner's allegations are set forth in Petitioner's complaint which is reproduced on pages 93a through 102a of Petitioner's Petition for Writ of Certiorari.

II. PROCEEDINGS BELOW

Petitioner Aurelia Davis, a/n/f of LaShonda D., filed a complaint against the Monroe County Board of Education, the Superintendent of Monroe County Schools Charles E. Dumas, and Hubbard Elementary School Principal Bill Querry alleging claims under 42 U.S.C. § 1983

and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

Respondents moved to dismiss, contending that Petitioner's complaint failed to state a claim for which relief could be granted under either Title IX or § 1983. The district court dismissed Petitioner's complaint finding that under this Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989), Respondents had no constitutional duty to protect LaShonda D. from the actions of a third party absent the existence of a special relationship. *Davis v. Monroe County Board of Education et al.*, 862 F. Supp. 363 (M.D. Ga. 1994).

The district court further held that Petitioner's Title IX claim had no basis in law because Petitioner did not allege that the Board had any role in the harassment and because the sexually harassing behavior of a fellow fifth grader was not part of a school program or activity. *Id.* at 367. Petitioner filed her Notice of Appeal to the Eleventh Circuit Court of Appeals.

A panel of the Eleventh Circuit unanimously affirmed the dismissal of Petitioner's § 1983 claims without discussion. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996). However, a divided panel reversed the district court's finding that Title IX did not provide a cause of action for student-to-student sexual harassment based upon a hostile environment negligence theory and held that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising

authorities knowingly fail to act to eliminate the harassment." *Id.* at 1193.

Judge Birch dissented from the majority's holding stating that the majority made an "unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student." *Id.* at 1196. Judge Birch argued that the language of Title IX does not indicate that such a cause of action was intended to be covered by its scope. *Id.*

Judge Birch further argued that even if Title IX encompasses student-to-student sexual harassment, it should only cover intentional conduct on the part of the school board rather than a claim for negligent failure to intervene to prevent sexual harassment as alleged by Petitioner. *Id.* Finally, Judge Birch argued that the remedy available for unintentional violations of Title IX should be limited to injunctive relief based upon this Court's precedent holding that Title VI (and therefore Title IX) does not support a monetary damages remedy for unintentional discrimination. *Id.*

Respondents timely filed a petition for rehearing *en banc* which was granted by the Eleventh Circuit on August 1, 1996. *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). On August 21, 1997 the Eleventh Circuit, sitting *en banc*, held that Title IX does not provide a cause of action for student-to-student sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). The Eleventh Circuit held that Title IX was enacted pursuant to the Spending Clause and therefore must unambiguously disclose to would-be

recipients all facts material to their decision to accept federal funding. *Id.* at 1406. The Eleventh Circuit held that Petitioner's complaint failed to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they would accept responsibility for remedying student-to-student sexual harassment when they chose to accept federal financial assistance under Title IX. *Id.*

Contrary to Petitioner's assertion, the Eleventh Circuit did not hold that "legal principles regarding sexual harassment that have developed under Title VII are not applicable to Title IX claims of sexual harassment." (Petitioner's Brief, p. 5.) Although, the Eleventh Circuit mentioned the appropriateness of applying Title VII principles to claims of student-to-student sexual harassment brought under Title IX, the Eleventh Circuit never reached the merits of that issue. Accordingly, this Court's decision on whether to grant Petitioner's Petition for Writ of Certiorari should focus on the correctness of the Eleventh Circuit's holding that a claim for student-to-student sexual harassment could not be brought under Title IX.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS REGARDING WHETHER SCHOOL DISTRICTS CAN BE HELD LIABLE FOR STUDENT-TO-STUDENT SEXUAL HARASSMENT UNDER TITLE IX.

Contrary to Petitioner's assertion, there is no split among the circuits that have addressed the issue of

whether Title IX provides a cause of action against school districts receiving federal funds for student-to-student sexual harassment. The only Circuits to squarely address this issue are the Fifth Circuit and the Eleventh Circuit. Both Circuits have held that Title IX does not provide a cause of action for student-to-student sexual harassment.

In *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 165, 136 L.Ed.2d 108 (1996), the Fifth Circuit held that Title IX does not create a cause of action for hostile environment sexual harassment based upon the conduct of one student toward another student. *Id.* at 1013. Like the Eleventh Circuit in this case, the Fifth Circuit held that Title IX is a funding statute enacted pursuant to Congress's spending power. *Id.* "As an exercise of Congress's spending power, Title IX makes funds available to recipient in return for the recipient's adherence to the conditions of the grant." *Id.* at 1012-13. The Fifth Circuit found that imposing liability upon grant recipients for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX. *Id.* at 1013. Consequently, the Fifth Circuit found that Title IX applies only to the practices of grant recipients themselves. *Id.*

The Eleventh Circuit's ruling reaches no further than the Fifth Circuit's holding in *Rowinsky*. While the Fifth Circuit stated that a school district *might* violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, that language is merely dicta.

Nevertheless, Petitioner's assertion that the Eleventh Circuit's reasoning in this case would foreclose liability under the scenario where a school responds differently to peer sexual harassment based upon the gender of the complainant is wrong. Under that scenario a school district would be held liable, not for an act of harassment by a third party, but for its own discriminatory action in treating the complaints of males and females differently.

In a feeble attempt to create conflict where none exist, Petitioner contends that in *Oona, R.S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), "the court held that school officials did not have qualified immunity in a peer sexual harassment case based on conduct that occurred in 1992, because it was clearly established, as of this Court's decision in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), that Title IX requires schools to take prompt and appropriate action to remedy a hostile environment created by students." The Ninth Circuit did not so hold.

In *Oona*, the Ninth Circuit was confronted with the question of whether school officials were entitled to qualified immunity under 42 U.S.C. § 1983 where they were being sued by a female student who alleged that she was sexually harassed by a student teacher. The Ninth Circuit held that the school officials were not entitled to qualified immunity under § 1983 based upon this Court's statement in *Franklin* that a school district might be liable in a situation where a teacher sexually harasses a student. *Oona* at 1209-1211. The Ninth Circuit held that a student's right to be free from sexual harassment by a teacher was clearly established at the time Oona was being harassed

in 1992 and therefore the school district had a duty to act. *Id.* at 1210.

The Ninth Circuit's holding centered on the school district's alleged failure to supervise a student teacher who was allegedly harassing Oona. *Id.* at 1210-1211. The Ninth Circuit specifically stated, "[w]e do not consider what steps school officials may reasonably be required to take to prevent harassment by fellow students." *Id.* Thus, contrary to Petitioner's assertion the Ninth Circuit did not hold that Title IX requires schools to take prompt and appropriate action to remedy a hostile environment created by students. Consequently, the Ninth Circuit's opinion in *Oona*, which addressed only the issue of qualified immunity under § 1983, does not create a conflict among the circuit courts.

Likewise, the other cases cited by Petitioner present no conflict. In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), a football player was subjected to a sexually explicit hazing incident by other football players. The Tenth Circuit rejected the student's claim because he failed to show the school official's conduct in addressing the incident was based upon sex. Moreover, the Tenth Circuit specifically declined to decide "what liability, if any, the school district might have for the acts of its students" or whether negligence would be a sufficient basis on which to impose liability. *Id.* at 1332 n.7.

Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995), is factually distinguishable from this case. *Brown* involved a mandatory school-sponsored assembly on AIDS awareness that contained sexually explicit skits. Although the First Circuit recognized the concept of a

school-created "hostile environment," it found the plaintiff's allegations insufficient to state a claim.

Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2nd Cir. 1995), involved an allegation by an adult dental student that she was being harassed by a patient at the clinic where she worked. The Second Circuit failed to reach the question of whether an entity could be held liable under Title IX or Title VII for failing to prevent harassment by a non-agent. *Id.* at 250. Rather, the Second Circuit determined that the plaintiff's allegations failed to state a claim under either statute.

Accordingly, no conflict among the Circuit Courts presently exists on this issue. While Respondent recognizes that various district courts have disagreed on this issue, the existence of disagreement in the district court does not merit granting the Petition. This Court denied a petition for writ of certiorari in *Rowinsky*. This Court also denied a petition for writ of certiorari in *J.W. v. Bryan Independent School District*, ___ U.S. ___, 117 S.Ct. 1694 (1997), an unreported Fifth Circuit case involving a claim of student-to-student sexual harassment under Title IX. This Court should also deny the writ in this case as the Eleventh Circuit's opinion is consistent with, and reaches no further than, the Fifth Circuit's opinion in *Rowinsky*.

II. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS REGARDING WHETHER TITLE VII PRINCIPLES SHOULD GUIDE COURTS IN DETERMINING A SCHOOL DISTRICT'S LIABILITY IN STUDENT-TO-STUDENT SEXUAL HARASSMENT CASES UNDER TITLE IX.

As stated above, the Eleventh Circuit never reached the merits of whether Title VII principles should apply to

a claim of student-to-student sexual harassment. Consequently, that issue is not properly before the Court. The Eleventh Circuit's opinion held that Petitioner could not bring an action for student-to-student sexual harassment under Title IX. This Court should base its determination to deny or grant the Petition solely on the correctness of that holding.

Nevertheless, the cases upon which Petitioner relies to demonstrate a "conflict" among the Circuits are factually distinguishable from this case. None of the cases relied upon by Petitioner involved the application of Title VII principles to a case of student-to-student sexual harassment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), was an employment case in which the court specifically held that its holding was limited to the employment context and noted that the action was limited to declaratory and injunctive relief. *Id.* at 884 n.3, 897. *Krancus v. Iona College*, 119 F.3d 80 (2nd Cir. 1997), involved a claim by two college students, one of whom was also an employee of the college, that they had been sexually harassed by a professor. Likewise, *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996), *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) and *Oona*, all involved allegations by a student that they were sexually harassed by a teacher. As stated above, the *Brown* case involved allegations that the school district had created a sexually hostile environment by sponsoring a school assembly on AIDS that involved sexually explicit skits. Therefore, all of those cases are inapposite.

Further, contrary to the implication in Petitioner's brief, the Second Circuit has not found that Title VII principles apply to a plaintiff's complaint that she had

been subjected to a sexually hostile educational environment by a patient. In *Murray v. New York University College of Dentistry*, the court specifically reserved ruling on the question of whether the "knew or should have known" standard of Title VII should be extended to a hostile environment that is allegedly created by a third party under Title IX. *Id.* at 250.

Moreover, Petitioner's reliance upon the opinions in the cases cited above ignores a basic distinction between Title VII and Title IX which makes the holdings in those cases in-applicable to a claim of student-to-student sexual harassment. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this Court concluded that common-law agency principles apply in determining whether an employer is liable for the acts of its employees because Title VII defines "employer" to include "any agent of such a person". 42 U.S.C. § 2000e(b). Title IX prohibits discrimination by an "education program or activity." 20 U.S.C. § 1681. Unlike the term "employer" in Title VII, Congress did not define "education program or activity" to include "agents" of the "program or activity." *Seamons v. Snow*, 864 F. Supp. at 1116, n.1. (Title IX contains no agency provision); *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (agency principles do not apply to claims under Title IX). Inasmuch as this Court in *Meritor* held that agency principles determine whether an employer is liable under Title VII for acts of sexual harassment committed by its employees based upon its definition of "employer", and Title IX does not contain an agency provision, it follows that cases involving claims against an entity based on the conduct of its employee as the harasser cannot create a conflict

among the Circuit Courts for the purpose of this case which does not involve an allegation that an agent of the entity was the harasser.

None of the cases relied upon by Petitioner addresses the issue of whether Title VII principles should apply to a claim for student-to-student sexual harassment under Title IX. Accordingly, no conflict is created among the Circuit Courts by the Eleventh Circuit's mentioning the appropriateness of applying Title VII principles to such claims brought under Title IX. Again, the fact that there might be differing opinions among the district courts as to whether Title VII principles should apply to claims of student-to-student sexual harassment is not a sound basis for this Court to grant the writ.

III. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Contrary to Petitioner's assertion, the Eleventh Circuit has construed Title IX in a manner that is consistent with the prior decisions of this Court concerning Spending Clause legislation. Title IX was enacted pursuant to the Spending Clause and was patterned after Title VI which prohibits intentional race based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983). The Spending Clause enables Congress to place conditions on the receipt of federal funds by grantees. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The legitimacy of the power is the *voluntary* and *knowing* acceptance of the conditions by the grantee. *Id.* at 17. This

Court has held that "there can of course be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal money, it must do so *unambiguously*." *Id.* (Emphasis added.) This Court reasoned that because the recipient of federal aid voluntarily consents to accept the aid and consequent federal requirements, the recipient *should not* be held liable for compensatory damages for an unintentional violation of Title IX absent notice that it is committing some act in violation of the federal requirements. *Id.; Franklin,* 503 U.S. at 74.

Title IX provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). The plain language of Title IX does not *expressly* create a cause of action for hostile environment sexual harassment based upon the conduct of one student toward another student. Moreover, nothing in the language of Title IX, the legislative history of Title IX or the regulations enforcing Title IX at the time the incidents in Petitioner's complaint allegedly occurred, served to put the school district on notice that it had an obligation to protect Petitioner from the actions of a fellow student, much less that it would be subject to monetary damages for negligently failing to protect Petitioner from the actions of another student.

Additionally, although Petitioner argues that the Eleventh Circuit's holding unreasonably restricts the application of Title IX, the legislative history of Title IX shows that both supporters and opponents of Title IX focused exclusively on the acts of grant recipients. This Court's opinions in *Guardians, Cannon, Pennhurst,* and other Spending Clause cases have focused on the policies and actions of the grant recipient itself. Nothing in prior Title IX jurisprudence discussed the liability of a school district for the actions of a third party who is not its agent.

The Eleventh Circuit correctly held that in a case such as this, where the conduct giving rise to injury is not that of the entity, justice and this Court's prior opinions, require that the entity receiving federal aid be aware of all of the obligations to be imposed upon it before it can be held liable in money damages. The Fifth Circuit so found in *Rowinsky,* and this Court denied the petition for writ of certiorari in that case. The Court should likewise deny the Petition in this case.

IV. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FRANKLIN*.

Petitioner's contention that the Eleventh Circuit's decision conflicts with this Court's holding in *Franklin* is simply wrong. In *Franklin,* this Court stated:

> Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on

> the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a *teacher* sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.

Franklin, 503 U.S. at 75. (Emphasis added). The comment quoted above was made by this Court in explaining its refusal to apply its holding in *Pennhurst*, which limits the remedies available under Spending Clause statutes when the alleged violation is unintentional, to intentional violations. This Court was not called upon and did not decide the circumstances under which an entity can be held liable under Title IX. Moreover, this Court did not use Title VII principles to analyze Title IX claims, or hold that a cause of action for teacher-to-student sexual harassment exists under Title IX.

Moreover, even if *Franklin* holds as Petitioner suggests, the harasser in *Franklin* was an employee of the school district. In this case neither the school district, nor any of its employees is alleged to have committed any act of harassment against LaShonda. Petitioner seeks to hold the school district liable for its alleged negligent failure to prevent another student, not its employee, from harassing Lashonda. "To suggest, as [Petitioner] must, that unwelcome sexual advances, from *whatever* source, official or unofficial, constitute Title IX violations is a leap into the unknown which, whatever its wisdom, is the

> duty of Congress . . . to take." *Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D. Pa. 1989).

The Eleventh Circuit's decision is completely consistent with this Court's holding in *Franklin* and other controlling precedent of this Court.

CONCLUSION

As stated previously, this Court denied a petition for writ of certiorari in the *Rowinsky* case which was decided by the Fifth Circuit on the same basis as the Eleventh Circuit's opinion in this case. Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 19th day of December, 1997.

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